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ALEXANDER L. STEVAS,
CLERK

No._____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

THE STATE OF TEXAS

Petitioner,

V.

PLATORO LIMITED, INC.,

Respondent,

IN RE THE UNIDENTIFIED REMAINS OF A VESSEL, HER CARGO, APPAREL, TACKLE AND FURNITURE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION OF THE STATE OF TEXAS FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case arises from the excavation by private parties of the archaeologically irreplaceable remains of the oldest New World shipwreck yet located, buried within the submerged lands belonging to the State of Texas, approximately one-half mile off the coast of Padre Island. The excavation was conducted without permission from the State of Texas, which subsequently recovered the artifacts. This case was brought by one of the private explorers, seeking to invoke the federal courts' admiralty jurisdiction to recover an award of salvage. The issues presented for review by this Court are:

(1) Whether the excavation of long-lost ancient vessels buried within the states' submerged lands involves a sufficient relationship with traditional maritime activity to justify application of

the federal courts' exclusive admiralty jurisdiction;

(2) Whether the existence vel non of marine peril, an essential element of a claim for salvage, must be determined as a factual matter with respect to an ancient vessel after its remains are located, or if marine peril exists as a matter of law with respect to such remains;

(3) Whether Texas' "constructive rejection" of salvage services, through statutes prohibiting unauthorized excavation of archaeological sites, was effective only "if the rejection must reasonably have been understood by the salvor;" and

(4) Whether the Eleventh Amendment bars this action, brought under a legislative consent-to-suit resolution, where no waiver of Eleventh Amendment immunity is stated, either by express language or

overwhelming implication, in the text of that resolution.

PARTIES TO THE PROCEEDING

The State of Texas is the Petitioner herein. Respondent is Platoro Limited, Inc., an Indiana corporation. Jefferson T. Burke and Billy Russell Algoe also intervened in this matter before the district court and filed notices of appeal to the Fifth Circuit Court of Appeals, but dismissed their appeals before filing briefs.

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PETITION OF THE STATE OF TEXAS
FOR WRIT OF CERTIORARI

The State of Texas, Petitioner herein, prays this Honorable Court to grant a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, in which said court permitted the recovery of an award of salvage by Respondent Platoro Limited, Inc., in connection with Platoro's unauthorized excavation of an archaeologically significant 16th Century Spanish vessel located approximately one-

half mile off the coast of Padre Island, within the submerged lands belonging to the State of Texas.

OPINIONS AND JUDGMENTS BELOW

The most recent decision of the Fifth Circuit Court of Appeals in this case, of which Petitioner seeks review, was rendered on January 20, 1983, and is reported at 695 F.2d 893 (Appendix A). The Fifth Circuit's order denying rehearing was rendered on February 17, 1983 (Appendix L), and has not been separately reported. The judgment of the Fifth Circuit was issued as mandate on February 28, 1983 (Appendix K). The Memorandum Opinion and Order of the United States District Court for the Western District of Texas which was under review in the Fifth Circuit was rendered on May 6, 1981, and is reported at 518 F. Supp. 816 (Appendix B). The district court also entered a Memorandum Opinion and Order

Denying New Trial and Entry of Additional Findings of Fact and Conclusions of Law on June 5, 1981 (Appendix D), and entered an Order denying the Intervenors' motion for new trial on June 8, 1981 (Appendix E), neither of which was officially reported.

Prior to its most recent decision in this case, the Fifth Circuit Court of Appeals had, on April 4, 1980, rendered an opinion reversing the decision of the United States District Court for the Western District of Texas that the case should be dismissed. That decision of the Fifth Circuit is reported at 614 F.2d 1051 (Appendix F). The decision of the district court there under review was issued on November 17, 1977 (Appendix G), and is not officially reported. This Court denied the petition for writ of certiorari to the Fifth Circuit Court of

Appeals on October 14, 1980. 449 U.S. 901.

The facts alleged, claim for recovery and parties to this suit are identical to two previous cases filed by Respondent Platoro Limited, Inc. The decision of the United States District Court for the Southern District of Texas in the first such case was rendered on December 26, 1973, and is reported at 371 F. Supp. 356 (Appendix J). On February 27, 1975, the Fifth Circuit Court of Appeals reversed that decision and ordered the case dismissed for lack of jurisdiction. 508 F.2d 1113 (Appendix I). The second case filed by Platoro was dismissed by the United States District Court for the Western District of Texas on August 13, 1976, in a Memorandum Opinion and Order (Appendix H), which is not officially reported.

A related suit was filed by the State of Texas against Platoro Limited, Inc., in the 28th Judicial District Court of Kenedy County, Texas, on December 13, 1967. The Court entered an unreported temporary restraining order and order appointing receiver of specific assets on that date (Appendix M). The case was subsequently dismissed by the State of Texas.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). Petitioner, the State of Texas, seeks review of the opinion and final judgment of the United States Court of Appeals for the Fifth Circuit rendered on January 20, 1983 (Appendices A and K), by means of the issuance of a writ of certiorari to that court. The Fifth Circuit's order denying rehearing was rendered on February 17, 1983 (Appendix L), and this

petition is brought within the time allowed by 28 U.S.C. §2101(c) and Supreme Court Rule 20.4.

PROVISIONS OF LAW INVOLVED IN THIS CASE

The Submerged Lands Act of 1953, 43 U.S.C. §§1301-1315, provides in pertinent part:

> 43 U.S.C. §1301.
>
> (a) The term "lands beneath navigable waters" means--
>
> (1) all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> * * *
>
> (b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a

member of the Union, or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico.

43 U.S.C. §1311.

(a) It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof.

43 U.S.C. §1314.

> (a) The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States and others by section 1311 of this title.

Article 147b of the Texas Penal Code, as effective in 1967, provided in pertinent part:

> TITLE: ARCHAEOLOGY.
>
> CHAPTER 1.
>
> REGULATING THE EXPLOATION FOR AND PROHIBITING THE FORGERY OF ARCHAEOLOGICAL OBJECTS.
>
> Sec. 3. If nonresidents of Texas, except agencies of the Federal Government, desire to make any exploration or excavation in or on any prehistoric

ruins or archaeological or vertibrate paleontological site in Texas, whether on private or State lands, a permit or annual license shall first be obtained from the Secretary of State. Such permit or annual license shall be issued by the Secretary of State upon: . . . (3) determination by said Secretary of State or by his duly designated representative of the satisfactory scientific fitness of the applicant to make archaeological or paleontological investigations, explorations, or excavations. Provided, however, that exploration to determine the presence of said archaeological and paleontological material exclusive of actual collecting or taking such material may be made previous to taking such permit. . . .

* * *

Sec. 6. Any person violating any of the provisions of this Act shall be guilty of a misdeameanor and shall forfeit to the State all articles and materials discovered by or misrepresented through his action or efforts. . . .

Sec. 7. The fact . . . that many archaeological and paleontological sites are being destroyed creates an emergency and an imperative public necessity. . . .

1939 Tex. Laws 60, 61.

Article 5421, Texas Revised Civil Statutes, as effective in 1967, provided in pertinent part:

> The Commissioner and the county attorneys of the State shall report to the Attorney General semi-annually, or oftener if they desire, the name and residence of each person, firm, association of persons or corporation who has cut, used, destroyed, sold or otherwise appropriated any timber from any public lands or taken any minerals or other property of value therefrom. . . . The Attorney General shall bring suit for the value of such property in any county where the injury or a part thereof occurs. . . .

1905 Tex. Laws 38.

House Concurrent Resolution No. 117, 65th Tex. Leg. (1977), provides in its entirety:

> WHEREAS, Platoro Limited, Incorporated, a foreign corporation authorized to transact business in the State of Texas, alleges that it recovered the remains of a vessel and its cargo, tackle, and furniture; and

WHEREAS, Platoro Limited, Incorporated, alleges that the State of Texas has taken possession of those remains without compensating Platoro Limited, Incorporated, for its expense in the salvage operation; now, therefore, be it

RESOLVED by the House of Representatives of the State of Texas, the Senate concurring, that Platoro Limited, Incorporated, is hereby granted permission to sue the State of Texas for whatever relief to which it may be entitled as a result of the State's taking possession of these remains; and, be it further

RESOLVED, that in the event suit is filed, service of citation and other required process be made on the Attorney General of the State of Texas, and that the suit be tried as other civil suits; and be it further

RESOLVED, that nothing in this resolution may be construed as an admission by the State of Texas, or by any of its employees, agents, departments, agencies, or political subdivisions of liability or of the truth of any allegation asserted by the claimant, but the alleged cause of action must be proved under the laws of this state as in other civil suits; and, be it further

> RESOLVED, that nothing in this resolution may be construed as a waiver of any defense, of law or fact, available to the State of Texas or to any of its employees, agents, departments, agencies, or political subdivisions, but every defense is specifically reserved.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

A. FACTS

On September 12, 1967, for the first time in over 400 years, the hands of man touched the remains of the Espiritu Santo. The Espiritu Santo last set sail on the morning of April 9, 1554, setting out as one of four Spanish vessels, "laden heavily with silver and colonists,

crew and cochineal, desires and dreams . . .."[1/] The ships set sail from Veracruz, returning to Spain by way of Havana. Before reaching Cuba, however, the ships were caught by an uncharacteristic and vicious spring storm in the Gulf of Mexico. Three of the four ships were driven back against the Texas coast, where they ran out of sailing room before the storm blew itself out. The three ships were driven aground, just off Padre Island, the narrow barrier reef extending from Corpus Christi to Port Isabel, where they were lost. The Espiritu Santo came to rest about a half mile off Padre Island, just north of the Mansfield Cut,

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1/ J. Davis, Treasure, People, Ships, and Dreams 7 (1977) (Exhibit R). (Unless otherwise indicated, all references to "exhibits" are to exhibits presented to the district court at the trial held on March 30, 1981, through April 1, 1981, before the United States District Court for the Western District of Texas.

where she settled to the clay bottom of the Gulf of Mexico, and was in due course covered by a four to ten foot layer of sand which, along with the encrustations which built up around the artifacts, effectively encased her remains from the surrounding environment and protected them from the corrosive effects of oxygen and the natural perils of the sea.

Survivors of the Espiritu Santo who made their way to shore apparently united with survivors of the other ships, and set out on a southerly trek along the coast, thinking themselves to be only two or three days from civilization. What followed was among the most gruesome and brutal tales of Texas history. Under the constant surveillance of hostile Indians who intermittently attacked, picking off members of the wandering band one at a time, the survivors struggled south against the inhospitable environment,

licking the morning dew from native vegetation for water, and ultimately shedding all clothing in a futile attempt to pacify the Indians. No more than two of the unfortunate Spaniards survived the tragic march south, which was to become an almost fabled part of Texas folklore, the first confused chronicling of which was compiled some 40 years after the events from stories told by Fray Marcos de Mena, one of the survivors.[2/]

Physical evidence of Fray Marcos' ordeal was virtually nonexistent until 1967, when the remains of the Espiritu Santo were located. The discovery was made by a group consisting of representatives of Platoro Limited, Inc., an Indiana corporation, and its joint venturers, William Kenon and Kurt Purvis.

2/ See J. Arnold and R. Weddle, The Nautical Archaeology of Padre Island - The Spanish Shipwrecks of 1554 35-48 (1978) (Exhibit P).

The express purpose of the joint venture was "finding a Spanish treasure ship off Padre Island." (Tr. 52).[3/] The wreck site discovered by the Platoro group was confined to an area approximately 80 by 100 feet (Tr. 118), at a water depth of 20 to 30 feet. (Tr. 70, 102, 121). As such, it was a very coherent archaeological site, apparently little affected by the waves or other conditions of the area. (Tr. 286, 298). It was covered by a four to ten foot layer of sand (Tr. 70, 191), and many of the artifacts were covered with a protective layer of encrustation (Tr. 589-92), which served to seal out corrosive oxygen.

The parties disagree sharply as to the adequacy of recovery techniques used by the Platoro group. A deflection shield

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3/ References to the transcript are to the transcript of proceedings at the trial on March 30, 1981, through April 1, 1981, unless otherwise indicated.

was fashioned by which the force generated by the propwash from the boat would expose, and sometimes scatter, the artifacts, which divers then attempted to recover. Upon learning of the excavations by the Platoro group, on December 13, 1967, the State of Texas filed suit, seeking and obtaining a temporary restraining order enjoining Platoro from "appropriating or taking any property of value from the public lands of the State of Texas," and from "engaging in . . . destroying or removing any artifacts or things of value from any historic ruin or archaeological site located on public lands of the State of Texas...."[4/] Prior to entry of the restraining order, however, Platoro had removed at least 1,600 articles from the site, including

4/ State of Texas v. Platoro Limited, Inc., No. 81 (28th Judicial Dist., Kenedy County, Texas) (Dec. 13, 1967) (Appendix M).

cannons and swivel guns, silver coins, crossbows, three virtually unique mariners' astrolabes and hundreds of ballast stones. Platoro transported these items to an ice cream factory in Indiana (Tr. 305, 309, 317-18), where the articles were stored until returned to the possession of the State of Texas in 1968 and 1969. The State placed the artifacts in the custody of the Texas Archaeological Research Laboratory at the University of Texas Balcones Research Center in Austin, where they were treated and preserved in accordance with the most advanced techniques known.

Although testimony offered by the State of Texas from leading archaeologists suggested that, in the view of those archaeologists, significant historical data had been lost because of the recovery techniques, inadequate records and methods of

preservation utilized by Platoro[5/] (Tr. 220-21, 266-69, 689-92), witnesses for both the State and Platoro described the remains of the Espiritu Santo as "perhaps the single most significant find" and "the most important archaeological find from Texas' Historical Period." (Tr. 238, 342).

B. PROCEEDINGS BELOW

This lawsuit was filed by Platoro on June 23, 1977. It is the third suit filed by Platoro in federal court, asserting an identical claim arising from a single set of operative facts.

Platoro first filed suit on August 6, 1969, in the United States District Court for the Southern District of Texas. Platoro Limited, Inc. v. The Unidentified

5/ Platoro contested the State's evidence on this point, offering evidence that the recovery techniques were, in the view of Platoro's witnesses, suitable.

Remains of a Vessel, etc., Civil Action No. 69-B-86 (hereinafter referred to as "Platoro I"). In that suit, Platoro sought to recover a salvage award for its activities in removing the then-unidentified remains of a sunken Sixteenth Century Spanish vessel buried within submerged lands belonging to the State of Texas. Exhaustive research conducted after the State of Texas recovered the artifacts from Platoro ultimately identified the remains as those of the Espiritu Santo. The State of Texas contested Platoro's claim, asserting its ownership of the artifacts recovered from its submerged lands, and disputing the propriety of any salvage award to Platoro. Jefferson T. Burke and Billy R. Algoe intervened in that case, also seeking salvage awards for their efforts in the recovery operations.

After trial before the United States District Court for the Southern District of Texas, the district court found that the State of Texas had adopted the common law rule that title to wrecked and abandoned vessels reverted to the sovereign after a year and a day, and therefore ruled that the State of Texas was the rightful owner of the remains of the vessel. Platoro I, 371 F. Supp. 356, 360 (S.D. Tex. 1973) (Appendix J). The court ruled, however, that Platoro and Intervenors Burke and Algoe should be awarded a recovery on their maritime salvage claims. Texas appealed the portion of that decision relating to the salvage award, and on February 27, 1975, the Fifth Circuit Court of Appeals reversed, holding that the district court lacked jurisdiction because the articles involved were entirely outside the Southern District of Texas at the time suit

was filed. Platoro Limited, Inc. v. Unidentified Remains of a Vessel, 508 F.2d 1113 (5th Cir. 1975) (Platoro I). (Appendix I). After remand, the case was dismissed for want of jurisdiction by the District Court on May 17, 1975.

On May 21, 1976, Platoro filed its second suit, in the United States District Court for the Western District of Texas. Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, etc., Civil Action No. A-76-CA-99 (hereinafter referred to as "Platoro II"). Pursuant to the State's motion, on August 13, 1977, the district court ordered that case dismissed for want of jurisdiction, ruling that the State of Texas was the real defendant at interest because it owned and had title to all the artifacts at issue, and therefore finding the suit to be barred by the Eleventh Amendment.

> Since the salvaged items in the instant case were not claimed by the owner within a year and a day of the wreck, title devolved on the sovereign, and thus, under the common law, the State of Texas now has title to all the recovered items. . . . Thus, since the State of Texas is the real defendant at interest in this suit, and since the State has not given its consent to be sued, this action cannot be maintained in the federal courts because the federal courts have no power, under the Eleventh Amendment, to hear it.

Platoro II, Memorandum Opinion and Order at 1-2 (August 13, 1976) (Appendix H). Platoro did not appeal that decision.

Some ten months later, on June 23, 1977, Platoro filed this suit), contending that it was authorized by House Concurrent Resolution No. 117 (65th Texas Legislature), which gave Platoro permission to sue the State for any relief to which it may prove itself entitled "under the laws of this state as in other civil

suits." (R. 7-10).[6/] On November 14, 1977, the Honorable Jack Roberts, United States District Judge for the Western District of Texas, entered a Memorandum Opinion and Order (Appendix G) finding that title to the artifacts rests with the State of Texas, and ruling that Platoro's salvage claim was barred by the two-year statute of limitations contained in 46 U.S.C. §730. Platoro appealed the dismissal of its salvage claim, but did not appeal the portion of the order dismissing its claim of title to the artifacts. On April 4, 1980, the Fifth Circuit Court of Appeals rendered its opinion stating that "the circumstances favor tolling the statute of limitations and granting Platoro the right to have its claim adjudicated," and ruling that

6/ HCR No. 117 is reprinted with the Provisions of Law Involved in this Case, supra.

Platoro's complaint stated a claim for salvage sufficient to overcome a Rule 12 motion to dismiss. Platoro Limited, Inc. v. Unidentified Remains of a Vessel, 614 F.2d 1051, 1055 (5th Cir. 1980) (Platoro III) (Appendix F). This Court denied certiorari on October 14, 1980. 449 U.S. 901. Accordingly, the case was remanded for a "determination of the merits" of Platoro's "salvage claim." 614 F.2d at 1056.

After remand, Messrs. Burke and Algoe were permitted to intervene in the case. A non-jury trial on the merits of all salvage claims was held on March 30, 1981, through April 1, 1981, before the United States District Court for the Western District of Texas, Honorable Lucius D. Bunton presiding. Testimony and evidence were introduced concerning

the nature of Platoro's operations, the artifacts found, expenses incurred, proper archaeological techniques, value of the artifacts, and differences among various shipwreck sites. On April 30, 1981, the Court entered its Memorandum Opinion and Order, which was filed on May 6, 1981 (Appendix B) and Judgment was entered (Appendix C) in favor of Platoro, but denying any relief to Intervenors Burke and Algoe on Eleventh Amendment and limitations grounds.

Texas appealed that judgment. Intervenors Burke and Algoe separately filed notices of appeal, but dismissed their appeals before filing briefs. On January 2, 1983, the Fifth Circuit Court of Appeals entered its opinion, ruling that H.C.R. No. 117 had waived the State of Texas' Eleventh Amendment immunity from

suit in federal court, that the federal courts' admiralty jurisdiction had been properly invoked, that the element of "marine peril," essential to allowing recovery on a maritime claim for salvage, existed "as a matter of law," and that Texas statutes prohibiting unauthorized excavations of archaeological sites and appropriation of property from state lands did not serve to reject Platoro's purported salvage services because "constructive rejection of salvage services should bar an award only if the rejection must reasonably have been understood by the salvor." Platoro Limited, Inc. v. The Unidentified Remains of a Vessel, 695 F.2d 893, 901, 902 (5th Cir. 1983) (Platoro IV) (Appendix A). Texas now seeks a writ of certiorari to the Fifth

Circuit Court of Appeals to review these conclusions.[7]

REASONS FOR GRANTING THE WRIT

A. IMPORTANCE OF THE CASE

This case involves one of two much-litigated controversies[8] which

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7/ The Fifth Circuit also made rulings which had the effect of limiting Platoro's recovery to its one-third share of any amount recoverable as salvage services by the joint venture in which Platoro was a one-third participant, and eliminating the possible implication in the district court opinion that Platoro might additionally recover attorneys' fees.

8/ The other much-litigated controversy involved the recovery of the Nuestra Senora de Atocha off the Florida Keys by a private treasure hunting group known as Treasure Salvors, Inc. The dispute among Treasure Salvors, the State of Florida and the United States may be traced through the history of litigation as reflected in the decisions of the Fifth Circuit Court of Appeals. Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 640 F.2d 560 (5th Cir. 1981) (Treasure Salvors III); State of Florida, Department of State v. Treasure Salvors, Inc., 621 F.2d 1340 (5th Cir. 1980) (Treasure Salvors II); Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel, 569

together have largely created the presently available body of law governing the rights of coastal states to protect historic sunken vessels buried within the states' submerged lands from unauthorized treasure hunting. The current state of the law, as developed primarily by the Fifth Circuit Court of Appeals, poses a substantial and immediate threat of irreparable damage to the cultural heritage which Texas and other coastal states

8/ (Cont.) F.2d 330 (5th Cir. 1978) (Treasure Salvors I). Treasure Salvors II reached this Court on the question of whether the Eleventh Amendment immunized the remains of the vessel from federal court process under the facts of that case, and was the subject of this Court's decision in Florida Department of State v. Treasure Salvors, Inc., 102 S. Ct. 3304 (1982). In its Treasure Salvors decision, however, this Court did not reach the broader issues concerning the existence vel non of federal admiralty jurisdiction in cases involving historic sunken vessels buried within the submerged lands of coastal states wishing to preserve those archaeological landmarks in the public domain for proper excavation and study.

have sought to protect by forbidding unsupervised plundering of pre-twentieth century shipwrecks. The Texas Antiquities Committee has identified some 563 pre-twentieth century shipwrecks believed to be buried within the submerged lands of the State of Texas alone. Each of these wrecks constitutes a unique archaeological site, capable of revealing myriad secrets of people and their societies, belongings, hopes and dreams as they existed in a specific culture on a specific day when tragedy struck. As world-renowned underwater archaeologist Dr. George Bass testified at trial, "each wreck is like a miniature Pompeii, it is a time capsule." (Tr. 267).

Unless reversed, the decision of the Fifth Circuit in this case, following its own precedent in Treasure Salvors I, threatens to turn the timeless vaults buried beneath the sea into open tombs,

to be robbed and stripped of their contents one by one. Failure to correct the Fifth Circuit's expansive view of federal admiralty jurisdiction will substantially derogate of the public's right, as implemented by state statutes and policies, to assure the orderly recovery of archaeological landmarks, in favor of a judicially created and federally imposed doctrine[9/] favoring the rights of commercial treasure hunters to exploit those sites in search of gold and silver.

9/ As at least one district court has already noted in following the Fifth Circuit's precedents in this field, "[T]he dominant federal maritime law derives as much from the rules developed by the American admiralty courts as from Congressional acts." Cobb Coin Company, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel, 525 F.Supp. 186, 201 (S.D. Fla. 1981), appeal docketed, No. 81-5737 (11th Cir.). The same court ruled that the federal admiralty law of salvage superseded provisions of the Florida Archives and History Act which would restrict excavation of sites designated as state archaeological landmarks. Id. (preliminary injunction); 549 F.Supp. 540, 548 (1982).

B. FEDERAL ADMIRALTY JURISDICTION SHOULD NOT APPLY TO LONG-LOST VESSELS BURIED BENEATH THE SEA

The present aberration which permits application of federal maritime law to disputes involving the remains of long-lost vessels received its genesis at the appellate court level in 1978, when the Fifth Circuit ruled in Treasure Salvors I that federal admiralty law permitted the award of the remains of the Atocha, recovered from the continental shelf, outside the territorial waters of the United States, to Treasure Salvors. To reach this result, the court fashioned a "law of finds" which it characterized as the "American rule," rejecting the English common law rule that abandoned vessels reverted to the sovereign after a year

and a day.[10/] The court thus awarded title to the finder, suggesting alternatively that the maritime law of salvage would "not contemplate a different result." 569 F.2d at 337.

When it decided Platoro III in 1980, the Fifth Circuit concluded that its previous decision in Treasure Salvors I was "dispositive of the issue whether appellant properly invoked the court's admiralty jurisdiction." Platoro III, 614 F.2d at 1055. Although the fully developed record of the present case (Platoro IV) offers numerous factual distinctions, which were presented to the court below

10/ Prior to the Fifth Circuit decision, at least two state supreme courts had embraced the English common law rule, State ex rel. Bruton v. Flying "W" Enterprises, Inc., 160 S.E. 2d 482 (N.C. 1968); State ex rel. Ervin v. Massachusetts Company, 95 So.2d 902 (Fla. 1956), cert. denied, 355 U.S. 881 (1957), and the same rule had been adopted by the district courts in Platoro I and Platoro II.

as a basis for distinguishing or limiting its prior decisions in Treasure Salvors I and Platoro III,[11/] the Fifth Circuit's ruling in this case makes clear that the judicially created and federally imposed doctrines established in that court's decisions will deprive coastal states of the means to protect their historic resources.

The application of federal admiralty jurisdiction to preempt state law should be restricted to cases having "a significant relationship to traditional

11/ Factual distinctions relating to the issue of "marine peril" will be discussed more fully in Part C, infra. The point should not here pass, however, without at least noting that the remains of the Atocha were located on the continental shelf, outside the territorial waters of the United States. Treasure Salvors I, 569 F.2d at 337-38. By contrast, the remains of the Espiritu Santo were located a half mile off Padre Island, buried within lands belonging to the State of Texas. See Submerged Lands Act of 1953, 43 U.S.C. §§1301-1315; United States v. Louisiana, 363 U.S.1 (1960).

maritime activity." Foremost Insurance Company v. Richardson, 102 S.Ct. 2654, 2658 (1982); Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249, 268 (1972). The excavation of the remains of a long-lost vessel buried beneath the ocean floor simply lacks a sufficient nexus with "traditional maritime activity" to justify the severe disjointing of our system of federalism resulting from invoking the federal courts' preemptive admiralty jurisdiction.

Principles of salvage law are of ancient origin, and take no account of modern state interests in preservation and scientific investigation of sites with historical and archaeological significance. Salvage law developed to promote the "humanitarian principles. . . which encourage all to render aid in the face of marine peril." Legnos v. M/V

Olga Jacob, 498 F.2d 666, 671 (5th Cir. 1974).

> Useful services of any kind rendered to a vessel or her cargo, exposed to any impending danger and imminent peril of loss or damage, may entitle those who render such services to salvage reward.

The Blackwall, 77 U.S. (10 Wall.) 1, 11 (1870).

The law of salvage was never intended to be a license to loot. The mechanical application of a rule allowing "salvors" to excavate and recover anything they find for their personal benefit is entirely outside the historic purposes of salvage law. The noble and selfless principles sought to be promoted by the law of salvage are debased by the characterization of treasure hunting in the same terms.

The nonseaworthy remains of an ancient vessel have long ago lost any significant

relationship with ongoing maritime activity, and should, therefore, be no longer subject to the exclusive admiralty jurisdiction of the federal courts. Rather, as suggested in the amicus brief submitted to the Fifth Circuit on behalf of the Advisory Council on Underwater Archaeology, the Society for American Archaeology and the Society for Historical Archaeology, the law of ocean mining should be applied to artifacts buried beneath the submerged lands of the states. Under these principles, any person seeking to excavate an underwater buried historic site would be required to obtain authorization from the owner of the lands, just as any person seeking to drill for oil or gas must obtain permission. There is nothing in the law of salvage to compel or justify a rule treating underwater archaeological sites any differently than land-based archaeological sites. Had

Platoro's excavation been on state-owned lands a half mile inland, rather than a half-mile off shore, there could hardly be doubt of Texas' authority to prevent the looting and seize the artifacts removed. To permit a different result merely because the site was located a half-mile off Padre Island flies in the face of this Court's rejection of a mechanical "locality test" of admiralty jurisdiction in Executive Jet Aviation, Inc. v. City of Cleveland, Ohio, 409 U.S. 249.

C. "MARINE PERIL" SHOULD BE AN ISSUE OF FACT

Even if the federal courts' admiralty jurisdiction extends to the recovery of some ancient vessels, the law of salvage should apply only upon demonstration of an actual existing marine peril, either imminent or reasonably to be apprehended. At least since this Court's decision in

The Blackwall, 77 U.S. (10 Wall.) 1 (1870), the element of marine peril has been recognized as a sine qua non to a claim of salvage. The courts have historically rejected any claim for purported "salvage" services rendered to vessels "not in danger, either imminent or reasonably to be apprehended." LaRue v. United Fruit Company, 181 F.2d 895, 899 (4th Cir. 1950). See, e.g., United Boat Service Corp. v. Dailey, 232 F.2d 383, 384 (2nd Cir. 1956); Phelan v. Minges, 170 F. Supp. 826, 828 (D. Mass. 1959) ("A person rendering such unnecessary service is not a salvor but an opportunist or an officious intermeddler).

The existence vel non of "marine peril" is intrinsically a question of fact. Even the Fifth Circuit's decision in Treasure Salvors I seemingly gave tacit recognition to the factual nature of the issue, observing:

> There is no dispute that the Atocha was lost. Even after discovery of the vessel's location it is still in peril of being lost through the actions of the elements.

Treasure Salvors I, 569 F.2d at 337. After the Fifth Circuit's decision in Platoro III remanded this case for trial, a full factual record was developed concerning the susceptibility of the remains of the Espiritu Santo to loss through actions of the elements after the location of the remains was discovered. At the least the evidence presented by the State was sufficient to create a contested issue of fact, requiring resolution. The evidence showed that the Espiritu Santo had remained covered by a heavy layer of sand for over 400 years, unaffected by the elements and protected from even the most violent of hurricanes. Dr. John Herbich, Professor of Ocean and Civil Engineering and Head of the Ocean

Engineering Program at Texas A & M University, testified in detail about the oceanic conditions at the wreck site, specifically calculating such factors as fetch, average wave height, slope, sediment size, sediment transport and wave energy.

Dr. Herbich, whose testimony was refuted by no credible scientific or empirical evidence, unequivocally testified that, based upon his studies of maximum erosion and accretion at the site of the Espiritu Santo wreck, the remains of the vessel were subject to no peril of loss or scatter, either imminent or reasonably to be apprehended. Indeed, Dr. Herbich sharply contrasted the conditions off Padre Island with the conditions off the Florida Keys, where the Atocha was scattered, calculating the wave energy at the Espiritu Santo site to be 1,814 foot pounds per second, compared to wave

energy of 182,845 foot pounds per second at the Atocha site. (Tr. 761)

Despite the factual record in this case, the Fifth Circuit chose to characterize its previous decision in Treasure Salvors I as holding that "marine peril existed as a matter of law where the ship's location was unknown," 695 F.2d at 901, and further rejected any attempt to show the absence of peril after the location of the vessel was discovered. 695 F.2d at 901 n. 9.

At the least, marine peril should be determined as an issue of fact on a case-by-case basis. The practical salutary effect of such an approach might be to motivate would-be treasure hunters to consult reputable scientific authority and formulate a good-faith belief that some peril actually exists before excavating a site which might be better left

for later scientific exploration. In this case, reasonable inquiry of academically trained experts would likely have yielded the information that wrecks of this vintage buried beneath the sands have stabilized and reached a state of equilibrium such that their condition would not be materially affected by remaining there for another 50 years or more. (Tr. 225-6, 590). The stability of the sands in the shallow waters of the Gulf of Mexico off Padre Island might have been confirmed by the fact that bones of ice age animals found in the vicinity of the wreck have been there for 10,000 years. (Tr. 224)

The greatest peril to irreplaceable historic remains often arises not from the elements, but from the prospect of

improper excavation, exposure to the elements and loss of valuable scientific data. Such was the case here. As testified by Dr. George Bass, widely regarded as one of the world's leading underwater archaeologists, with respect to the remains of the Espiritu Santo as they lay on the clay bottom of the Gulf of Mexico, "simply being disturbed by human beings would constitute the greatest peril under the conditions that I have seen." (Tr. 301-2).

D. THE STATE'S "CONSTRUCTIVE REJECTION" OF SALVAGE SERVICES SHOULD HAVE BEEN HONORED

The State of Texas has, through laws which were in effect at the time of Platoro's activities, rejected any unauthorized excavations of archaeological sites or encroachment upon the State's submerged lands. Article 147b of the Texas Penal Code, as it existed in

1967,[12/] expressly required any non-resident of Texas, other than an out-of-state agency cooperating with a state-supported institution of higher education, to obtain a permit from the Secretary of State before making "any exploration or excavation in or on any. . . archaeological . . . site in Texas, whether on private or State land." Such permit could be issued by the Secretary of State only after his determination "of the satisfactory scientific fitness of the applicant to make archaeological or paleontological investigations, explorations, or excavations." Id.

12/ 1939 Tex. Laws 60 (reproduced in pertinent part among Provisions of Law Involved in this Case, supra). This statute was superseded when Texas enacted its current Antiquities Code in 1969. See Tex. Nat. Res. Code ch. 191.

The wreck of the Espiritu Santo indisputably constituted an "archaeological site" of great significance, as recognized by witnesses for both sides. (Tr. 238, 263, 342, 400). The statute clearly related to any exploration or excavation "in or on any. . . archaeological . . . site in Texas." Article 147b of the Texas Penal Code was enacted to prevent exactly the type of activity undertaken by Platoro. As stated in the emergency clause of the bill enacting article 147b, the fact "that many archaeological and paleontological sites are being destroyed creates an emergency and an imperative public necessity" for immediate legislative action. 1939 Tex. Laws at 61. Thus, at least since 1939, the State of Texas has manifested its clear intent to regulate the excavation of archaeological sites to assure the scientific qualifications of those who would disturb those

sites. Moreover, Texas' requirement of governmental approval for archaeological excavations within the State's submerged lands should hardly have come as a surprise to any would-be explorer. Dr. George Bass, who has conducted or participated in underwater archaeological digs in at least four continents, as well as in this country, testified that he had never undertaken an underwater excavation without obtaining the permission of the appropriate government, stating that such permission is uniformly required. (Tr. 277).

Texas' rejection of unauthorized encroachment upon its submerged lands, for "salvage" or other purposes, is further manifested by article 5421, Texas Revised Civil Statutes, as in effect in

1967.[13/] That statute required the Attorney General to bring suit against any person who had "appropriated . . . any minerals or other property of value" from any public lands. In fact, the Attorney General of Texas filed suit to enjoin Platoro's activities promptly after the State learned of their existence, and obtained a Temporary Restraining Order and Order Appointing Temporary Receiver, restraining Platoro from "appropriating or taking any property of value from the public lands of the State of Texas," and from "engaging in. . . destroying or removing any artifacts or things of value from any historic ruin or archaeological site located on public lands of the State of Texas and in particular the site of a sunken ship lying

13/ 1905 Tex. Laws 38 (reproduced in pertinent part among Provisions of Law Involved in this Case, supra.)

approximately 2.8 miles north of the Port Mansfield cut, and 1/2 mile east of the seaward shore off Padre Island. . . ." State of Texas v. Platoro Limited, Inc., No. 81 (28th Judicial District Court, Kenedy County, Texas, December 13, 1967) (Appendix M).

The Fifth Circuit decision in this case acknowledged the general rule that a salvage award "may be denied if the salvor forces its services on a vessel despite rejection of them by a person with authority over the vessel," 695 F.2d at 901, but nonetheless refused to apply the rule here because "Platoro had no reason to understand that its services had been rejected." 695 F.2d at 902. The court reasoned that Texas law at most constituted "constructive rejection" of unauthorized "salvage services," and that:

> At the very least, constructive rejection of salvage services should bar an award only if the rejection must reasonably have been understood by the salvor.

695 F.2d at 902.

If the federal courts are to exert their admiralty jurisdiction in such an expansive manner as to assume the role of arbiter of the fate of sunken historic artifacts, surely such an intrusion into the states' control of their submerged lands should be accomplished with maximum sensitivity to the states' legitimate interests in protecting their heritages from unauthorized looting.

The courts have historically recognized the right of a property owner to reject uninvited "services" of would-be-salvors, admonishing that salvage services "should not be thrust upon the unwilling." Consolidated Towing Co. v. Hannah, 509 F. Supp. 1031, 1035 (W.D. Mo. 1981), quoting

M. Norris, The Law of Salvage 195 (1958). See, e.g., Legnos v. M/V Olga Jacob, 498 F.2d 666, 672 (5th Cir. 1974); The Snow Maiden, 155 F. Supp. 518, 520 (D. Mass. 1957); The Choteau, 9 F. 211 (E.D. La. 1881). The State of Texas has never requested or accepted the assistance of Platoro in "salvaging" the Espiritu Santo. On the contrary, upon learning of Platoro's activities, State officials acted promptly to terminate them. Platoro acted at all times without the knowledge or permission of the State of Texas. There can be little doubt that had Platoro informed State officials of its intentions before undertaking recovery operations, those operations would never have been allowed. Texas has, through laws which were in effect and published in 1967, and which, of course, constitute public notice of the State's action, see Taff v. State, 155 S.W. 214,

216 (Tex. Crim. App. 1913), clearly rejected any unauthorized excavation of archaeological sites or encroachment upon its submerged lands. Significantly, the only state court to interpret the pertinent Texas statutes with respect to this controversy found them applicable to Platoro's activities and enjoined Platoro from further excavation on the Espiritu Santo, and further ordered Platoro to relinquish all remains of the vessel. (See Appendix M). The State has rejected Platoro's "salvage" services, and Platoro is precluded from now recovering compensation for those "services," which in fact amounted to no more than a naked attempt to enter upon State lands and appropriate State property.[14/]

14/ As stated by one of Platoro's joint venturers when asked what service he and his colleagues had rendered for the State of Texas, the Treasure hunters who excavated the Espiritu Santo were "not trying to render anything to the State of

E. TEXAS HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY

The Fifth Circuit correctly recognized that Platoro's claim is barred by the Eleventh Amendment prohibition of suits against the State[15/] unless Texas has waived its immunity.

> Platoro does not argue that the eleventh amendment does not apply to this suit; indeed, given Platoro's failure to appeal the district court decision [in Platoro II] that Texas owned the res and that suit was therefore barred by the eleventh amendment, it is now res judicata that the eleventh amendment applies.

14/ (Cont.) Texas. . .," (Tr. 201), and in fact removed all the artifacts they recovered to the State of Indiana until ordered to return them by the district court for Kenedy County. (Tr. 49).

15/ Platoro Limited, Inc. is an Indiana corporation. Thus the Eleventh Amendment literally applies, even under the view long held by Mr. Justice Brennan. See, e.g., Florida Department of State v. Treasure Salvors, Inc, 102 S.Ct. 3304, 3322 (Brennan, J., concurring in part and disserting in part).

695 F.2d at 898. The court further recognized the settled authority from this Court that a waiver of Eleventh Amendment immunity will be found "'only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction."'" 695 F.2d at 899, quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974), quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1909).

The Fifth Circuit nonetheless chose to modify the rule repeatedly stated by this Court requiring any waiver of Eleventh Amendment immunity to appear "from the text," reasoning that the cases applying that rule all involved waivers "in statutes of general application," whereas this case involved a legislative resolution permitting a single party to sue.

> No Supreme Court case has involved a state waiver which was enacted to permit one particular suit alone. . . .

695 F.2d at 899. The Fifth Circuit then fashioned a new standard for reviewing consent-to-sue resolutions, looking to "the circumstances as well as the text." 695 F.2d at 900.

A state clearly has the prerogative to consent to suit in its own courts without waiving its Eleventh Amendment immunity from suit in federal court. Smith v. Reeves, 178 U.S. 436 (1900). It has heretofore been generally accepted by all state legislatures, including Texas', that mere legislative consent for a state agency to "be sued" is insufficient to waive Eleventh Amendment immunity from suit in federal court. Ford Motor Company v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945); Great Northern Life Insurance Co. v.

Read, 322 U.S. 47 (1944); McDonald v. Illinois, 557 F.2d 596 (7th Cir. 1977), cert. denied, 434 U.S. 966; Martin v. University of Louisville, 541 F.2d 1171 (6th Cir. 1976); Jagnandan v. Giles, 538 F.2d 1166, 1177 (5th Cir. 1976), cert. denied, 432 U.S. 910 (1977).

House Concurrent Resolution No. 117,[16/] the legislative consent to suit resolution involved here, expressly directs that Platoro's suit must "be tried as other civil suits," and that

> . . . the alleged cause of action must be proved under the laws of this state as in other civil suits. . . .

(Emphasis added). This language strongly suggests a legislative contemplation of suit in the state courts only. The

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16/ H.C.R. No. 117, 65th Tex. Leg. (1977) (reproduced among Provisions of Law Involved in this Case, supra).

consent was predicated upon the Legislature's assumption that Platoro's claim would be governed by procedural and substantive rules adopted by the Legislature and courts of Texas. The procedures and remedies available in an in rem admiralty action are foreign to the jurisprudence of Texas and, insofar as applicable to the State, would be violative of well-settled public policy. The language of House Concurrent Resolution No. 117 does not justify imputation of a legislative intent to subject the State to the jurisdiction of a forum operating under procedures beyond the control of the State and with power to impose remedies contrary to the public policy of Texas.

On the contrary, Platoro was granted permission to sue the State upon its allegation that the State had taken possession of those remains without "compensating" Platoro "for its expense" in the

recovery operation, and Platoro was authorized to seek relief to which it may be entitled "as a result of the State's taking possession of these remains." Service of citation and other process was required to be made on the Attorney General. House Concurrent Resolution No. 117 at 1. Cf. Admiralty Rule C, providing for execution of process by arresting the vessel in an admiralty action in rem. Clearly, what was contemplated by the Legislature was a conventional civil action for damages rather than an in rem admiralty action in which the State's property could actually be attached, arrested, and ultimately subjected to a public sale. Indeed, Platoro has availed itself of the consent actually granted by H.C.R. No. 117, and has filed a pending suit in state district court alleging claims arising under state law. Platoro Limited v. State of Texas, No. 279,747

(200th Judicial District Court, Travis County, Texas.)

This Court's decision in Great Northern Life Insurance Co. v. Read, 322 U.S. 47 (1944), that a State's consent to suit "in the court having jurisdiction," 322 U.S. at 49 n.1, was insufficient to waive Eleventh Amendment immunity, should be controlling here. House Concurrent Resolution No. 117 does not manifest a "clear declaration" of intent to subject the State to the jurisdiction of a federal admiralty court. In the absence of such a clear declaration, the federal courts lack jurisdiction to hear Platoro's claim.

CONCLUSION

For the foregoing reasons, Petitioner prays that this Court grant a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. Upon review, the decision below should be

vacated and this case should be dismissed for want of jurisdiction because the case does not present a claim properly cognizable under the admiralty jurisdiction of the federal courts, and because the action is barred by the Eleventh Amendment. Alternatively, if the Court addresses the merits of Respondent's "salvage" claim, the case should be reversed because of Texas' rejection of any such salvage services and because of the absence of any legitimate "marine peril" or, alternatively, should be remanded for a factual determination of the existence vel non of any marine peril after the discovery of the location of the remains of the Espiritu Santo.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this the 17th day of May, 1983, three copies of the foregoing Petition for Certiorari and the accompanying Appendix were served upon counsel for Respondent by placing same in the United States mail, postage prepaid, addressed to Mr. Jack Sanchez, O'Leary, Sanchez & Benton, P.O. Box 4215, Brownsville, Texas 78520. I further certify that all parties required to be served have been served.

_____

James F. Parker

APPENDIX IS PRESENTED

IN A SEPARATE VOLUME